

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	

PETITION FOR RECONSIDERATION

Mescalero Apache Telecom, Inc. (“MATI”), by its counsel and pursuant to Section 1.429(a) of the Commission’s Rules, hereby submits its petition for reconsideration (“Petition”) with respect to the Commission’s *Report and Order* released on April 5, 2018 in the above-captioned proceeding.¹ MATI, a rural local exchange carrier wholly-owned by the Mescalero Apache Tribe, serves the Mescalero Apache Reservation, an area of approximately 720 square miles in south central New Mexico. MATI undertook the risk of serving a historically underserved and economically disadvantaged area in order to afford the Mescalero Apache people with access to telecommunications and broadband services, thus increasing the Tribe’s access to education, commerce, government and public services. By doing so, MATI helped bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation.

In the *Report and Order*, the Commission increased the amount of operating expenses that carriers predominantly serving Tribal lands can recover from the universal service fund

¹ *Connect America Fund*, Report and Order, FCC 18-37 (rel. Apr. 5, 2018) (“*Report and Order*”).

(“USF”), “in recognition that they are likely to have higher costs than carriers not serving tribal lands.”² More specifically, the Commission raised its “opex” limitation to 2.5 standard deviations above the regression-determined amount for study areas where a majority of the housing units are on Tribal lands.³ At the same time, the Commission limited this relief to, *inter alia*, carriers who have *not* deployed broadband service of 10 Mbps download/1 Mbps upload to 90 percent or more of the housing units on the Tribal lands in their study area.⁴ A carrier’s level of deployment is determined using FCC Form 477 information and housing unit information from the U.S. Census Bureau.⁵ For the reasons set forth below, MATI seeks reconsideration of the Commission’s “90 percent” condition, as it unnecessarily harms MATI and its customers, all of whom reside on Tribal lands. Specifically, MATI requests that, consistent with steps the Commission has taken with respect to other high-cost program rules limiting support based on Form 477 deployment data, carriers subject to the 90 percent condition be permitted to submit additional information to demonstrate their actual deployment levels in order to avail themselves of the relief provided in the *Report and Order*.⁶

As an initial matter, the *Further Notice of Proposed Rulemaking* that led to the *Report and Order* gave no notice that the Commission was considering imposing *any* conditions on

² *Report and Order* ¶ 1.

³ *Id.* ¶ 6.

⁴ *Id.* ¶ 7.

⁵ *Id.* ¶ 7 n. 18.

⁶ While MATI is specifically requesting reconsideration of the 90 percent condition to which it is subject, the same process could be considered for carriers subject to the 85 percent unsubsidized competitor condition as well.

opex relief for carriers on Tribal lands.⁷ Moreover, the Commission cites no record support for the 90 percent condition and offers no explanation as to why such a condition is necessary to “limit this relief to those carriers with the greatest need to accelerate broadband deployment.”⁸

Deploying broadband to a significant portion of the locations on the Mescalero Apache Reservation and maintaining service to those locations in a very remote and mountainous area with severe weather conditions, among other factors, increases MATI’s operating expenses. Thus, MATI’s need for opex relief is actually *greater* than that of carriers with lower deployment levels. In effect, the 90 percent condition punishes MATI and other carriers like it for doing exactly what the Commission presumably wants them to do – deploy broadband services as widely as possible in unserved and underserved areas – and it provides a disincentive for achieving deployment beyond 90 percent.

Leaving aside the concerns discussed above, the *Report and Order* fails to recognize that FCC Form 477 data may not reflect actual deployment, and thus may not accurately reflect whether a carrier has satisfied the 90 percent condition. Indeed, the Commission itself has previously recognized the shortcomings of Form 477 as a tool for measuring actual deployment.⁹

The National Telecommunications and Information Administration (“NTIA”) has also recently

⁷ See *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3227-8 ¶ 382 (2016) (“*CAF R&O and FNPRM*”). Because MATI had no prior opportunity to address the 90 percent condition in this proceeding, its petition for reconsideration of the 90 percent condition satisfies Section 1.429(b)(2) of the Commission’s Rules. See 47 C.F.R. § 1.429(b)(2). Alternatively, given the potential impact of the 90 percent condition on MATI and its customers, MATI requests consideration of this petition under the public interest standard in Section 1.429(b)(3) of the Commission’s Rules. *Id.* § 1.429(b)(3).

⁸ *Id.*

⁹ See, e.g., *Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, 32 FCC Rcd 6329, 6339-40 ¶ 33 (2017).

noted the limitations of Form 477 data, stating that the FCC’s data collection program “can lead to overstatements in the level of broadband availability, especially in rural areas where Census blocks are large.”¹⁰ MATI is a case in point. MATI’s current Form 477, which has been correctly filed per the Form 477 instructions, indicates that it provides 10/1 Mbps connectivity to 95 percent of the locations in its service area. However, based on a detailed assessment of MATI’s actual deployment using industry accepted engineering principles and select speed tests at actual locations, MATI has determined that it is *not* currently able to deliver 10/1 Mbps connectivity to 90 percent of the housing units in its service area, and thus should be eligible for opex relief.

The maps provided as Exhibits 1 and 2 hereto illustrate the problem with relying on Form 477 data in MATI’s case.¹¹ As a result of physical limitations to MATI’s infrastructure where some customers are served by an aging copper network, it is only capable of delivering 10/1 Mbps connectivity to households within a certain distance of its remote offices or DSLAMs. For MATI, that distance is optimistically estimated to be 9,600 feet. Due to the way housing units are distributed on the Mescalero Apache Reservation, only some of the housing units served by MATI are within 9,600 feet of a remote office/DSLAM and thus capable of receiving 10/1 Mbps connectivity. MATI has determined that these households represent less than 90 percent of the total households to which MATI has deployed service.

¹⁰ Improving the Quality and Accuracy of Broadband Availability Data, 83 Fed. Reg. 24747, 24748 (May 30, 2018).

¹¹ These maps and other supporting material have previously been submitted to the Commission via *ex parte* presentations to Commission staff. *See, e.g.*, Letter from Patrick R. Halley, Counsel for Mescalero Apache Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (May 22, 2018).

Standing alone, this calculation would make MATI eligible for opex relief (since it is less than 90 percent). Under the current Form 477, however, 10/1 Mbps connectivity is deemed available to *all* households in a census block where even one household is capable of receiving that service.¹² As a result, households that are more than 9,600 feet from MATI's remote offices/DSLAMs are deemed capable of receiving 10/1 Mbps service when in fact they are not. This is why MATI is deemed on the Form 477 to provide 10/1 Mbps service to 95% of the total households to which MATI has deployed service. This would render MATI ineligible for opex relief under the *Report and Order*, even though its actual level of deployment indicates otherwise.

Accordingly, to ensure fair administration of the 90 percent condition, MATI asks that the Commission provide carriers on Tribal lands with a procedural vehicle through which they can demonstrate that their actual level of deployment differs from their Form 477 data, and that they should therefore be deemed eligible for opex relief (assuming their actual deployment satisfies the 90 percent condition). There is Commission precedent for allowing carriers to demonstrate that actual service differs from Form 477 data in order to prevent the inappropriate loss of universal service revenues. Specifically, in the context of the Commission's rule requiring the phase-out of support for carriers who are 100 percent overlapped by an unsubsidized competitor,¹³ the Commission permits carriers subject to the rule to demonstrate

¹² See, e.g., *Wireline Competition Bureau Publishes and Requests Comment on Rate-of-Return Study Areas Potentially 100 Percent Overlapped by Unsubsidized Competitors*, Public Notice, 32 FCC Rcd 6528, 6530-31 ¶ 7 (2017) (“[W]hile a Form 477 filer may truthfully certify that it is offering service in a given area, the filer may not offer service to all locations in that census block; a Form 477 filer is required to report service even if in a given block it offers service to only a fraction of the residential and business locations.”) (“2017 WCB Public Notice”).

¹³ See 47 C.F.R. § 54.319(a).

that Form 477 data from an unsubsidized competitor is inaccurate.¹⁴ This type of process is necessary to ensure that a carrier does not lose universal service support where an unsubsidized competitor's Form 477 does not accurately reflect where it is actually providing service.

Given how critical universal service support is to carriers like MATI, the Commission should direct the Wireline Competition Bureau ("Bureau") to establish a similar process that would ensure that such carriers do not lose their eligibility for opex relief where their Form 477 filings overstate where they are actually providing service. The process need not be complex or structurally different than the process the Bureau already uses when reviewing data in the context of challenges to the 100 percent overlap rule. To minimize any burdens on the Bureau's staff, any potentially affected carrier should be responsible for initiating this process where they believe its most recent Form 477 filing inaccurately reflects that it is providing 10/1 Mbps service to at least 90 percent of the housing units on Tribal lands in its study area. The carrier would then bear the burden of demonstrating with sufficient evidence that its actual deployment falls below the 90 percent threshold. The Bureau would then make a determination as to whether the carrier satisfies the 90 percent condition and, if it does, issue a formal ruling that the carrier is eligible for opex relief and direct the Universal Service Administrative Company ("USAC") to take the necessary steps to provide such relief. The carrier could then annually certify that it continues to satisfy the 90 percent condition until it no longer does so.

¹⁴ See, e.g., *2017 WCB Public Notice*, 32 FCC Rcd at 6532 ("Rate-of-return carriers identified on the preliminary list of 100 percent overlapped study areas also are free to submit evidence . . . that an unsubsidized competitor does not offer service to all locations in the census blocks specified in the provided spreadsheet and/or that the competitor is not offering service to all locations within those blocks."); *CAF R&O and FNPRM*, 31 FCC Rcd at 3138 ¶ 132 (providing examples of information that may be persuasive to establish that an unsubsidized competitor has not created 100% overlap).

WHEREFORE, Mescalero Apache Telecom, Inc. requests that the Commission reconsider the *Report and Order* and issue relief consistent with this Petition.

Respectfully submitted,

MESCALERO APACHE TELECOM, INC.

By: /s/ Patrick R. Halley
Patrick R. Halley

Wilkinson Barker Knauer LLP
1800 M Street, NW
Suite 800N
Washington, D.C. 20036
202.383.3356

Counsel for Mescalero Apache Telecom,
Inc.

May 30, 2018

EXHIBIT 1

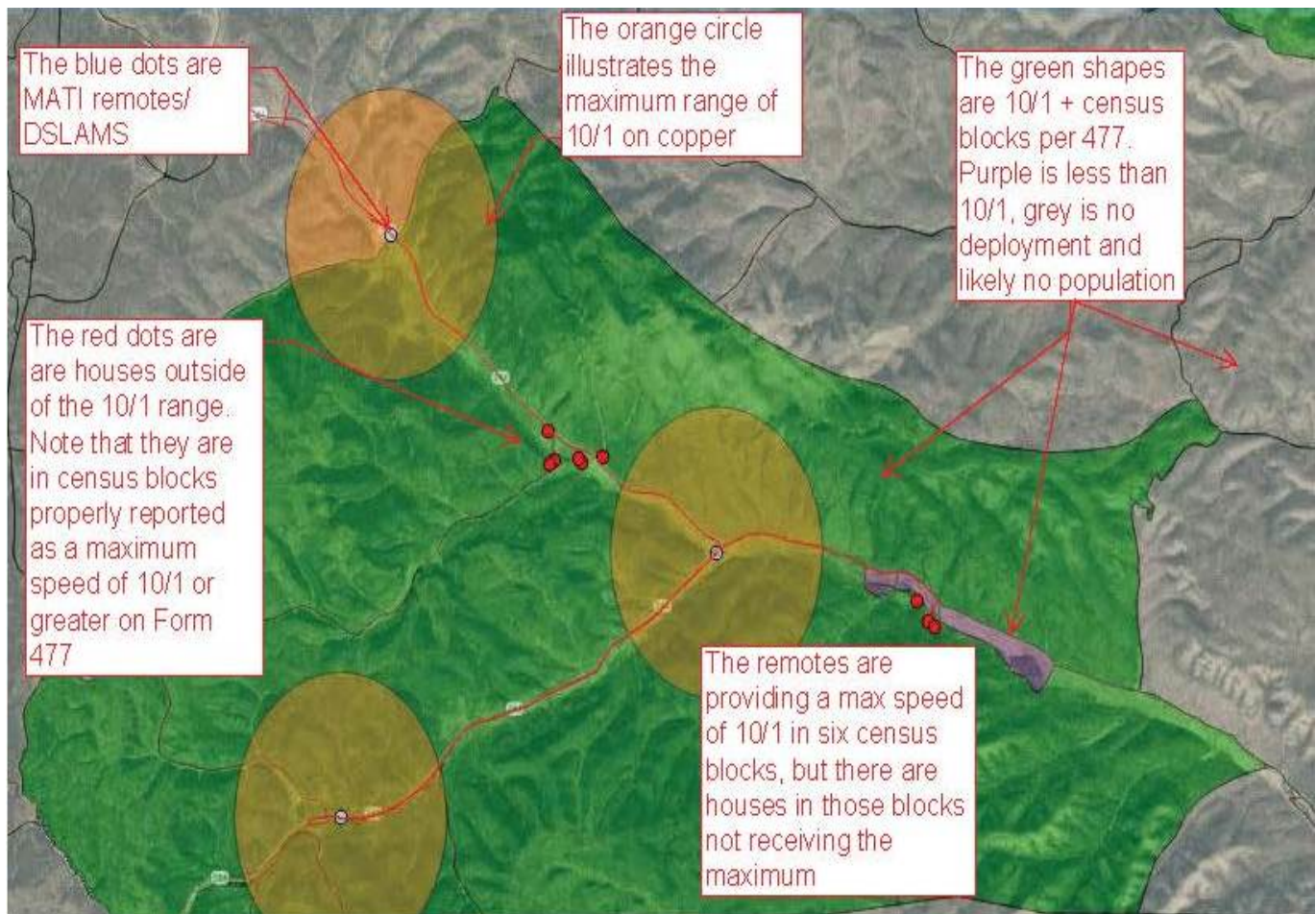


EXHIBIT 2

